**BRITISH VIRGIN ISLANDS**
**EASTERN CARIBBEAN SUPREME COURT**
**IN THE HIGH COURT OF JUSTICE**
**COMMERCIAL DIVISION**

**CLAIM NO: BVIHC (COM) 48 OF 2011**

**BETWEEN:**

**NORSK TILLITSMANN ASA**

**Applicant**

**and**

**NORINVEST LTD**

**Respondent**

**Appearances:** Mr Andrew Willins for the Applicant creditor
Mr Willam Hare and Mr Robert Nader for the Company and Brutel AS

**JUDGMENT**

[2011: 30 May, 14, 27, 11 July]

(Application for appointment of Liquidators – company incorporated in BVI but carrying on business in Norway - company in liquidation in Norway on application of BVI applicant – applicant claiming to be a creditor of the company – whether company in a position to dispute the debt – whether company estopped by Norwegian proceedings from disputing applicant's debt in this jurisdiction)

[1] **Bannister J [ag]:** This is an application by Norsk Tillitsmann ASA ('NTM') for the appointment of Mr David Griffin as liquidator of a BVI registered company called Norinvest Limited ('the Company'). The Company formerly carried on business in Norway in the offshore drilling industry. NTM claims to be a creditor of the Company in the sum of US$30.4m due to it from the Company pursuant to a guarantee which it gave (together with seven other co-guarantors) to NTM on 12 June 2008 to secure payment of interest due on loan facilities granted by NTM to Thule Drilling ASA, an associated company, and which were then in arrears ('the guarantee'). The application is opposed by the Company and by an associated creditor of the Company named Brutel AS ('Brutel').

[2] The guarantee is in straightforward terms and is governed by Norwegian law. The parties irrevocably submitted to NTM's jurisdiction (i.e. Norway). NTM made a demand in writing on the Company in Norway on 5 January 2009. The demand was not satisfied and on 2 July 2010 NTM petitioned what I believe is correctly described as the Probate Court[1] in Oslo ('the Probate Court') for an order that the Company be placed under the administration of that Court as an estate in bankruptcy. That petition was granted on 30 August 2010 and a Mr Thomas Brandi, an advocate practicing in Oslo ('Mr Brandi'), was appointed as trustee of the bankruptcy.

[3] The Probate Court gave a fully reasoned written judgment. That Court, of course, applied Norwegian legal principles to its decision, but it is clear from the translation which is before this Court that the Probate Court, having observed at the outset that in order to found a bankruptcy order a debt must be 'obvious', meaning something more than a debt established on a mere balance of probabilities, held (1) that NTM had not broken implied duties of care which it owed to the Company[2]; and (2) that the guarantee was an on-demand guarantee, meaning that it was not open to the Company to challenge a demand made upon it unless the demand was 'obviously unfounded'[3]. The evidence shows, and I do not think it was seriously challenged, that if a guarantee is classified under Norwegian law as an on-demand guarantee, the surety is obliged to pay in full without set off or deduction for any cross claim which it may have. Only after payment has been made may such claims be made against the creditor[4]. The Court decided that the evidence relied upon by the Company at the hearing did not enable the Court to find that the demand was 'obviously unfounded' and put the Company into bankrupt administration accordingly.

[4] I therefore treat the decision of the Probate Court as a finding of mixed fact and law that it was obvious that the Company was immediately liable to NTM in the full amount claimed under the guarantee. The decision has not been appealed and it is not disputed that the deadline for any appeal has passed.

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[1] it has also been referred to as Oslo County Court and the Execution Court

[2] the transcript contains an obviously erroneous 'not' in the relevant passage – marked by the translator with '[sic]'

[3] the evidence of Peter Hjorth, a Norwegian lawyer who has made an affidavit on behalf of NTM, says that for a claim under an on demand guarantee to fail it must be shown to be fraudulent but I doubt if that is in practice a different test

[4] indeed, clause 6 of the guarantee expressly provides as much

[5] The other seven guarantors have, however, commenced proceedings in the Oslo City Court ('the City Court') challenging their liability under the guarantee. Seven of them are not legally represented and are thus obliged to go to conciliation in the first instance, but one ('Silvercoin') has appointed counsel and has thus been able to proceed without preliminary mediation. Silvercoin has lost on a preliminary issue to determine whether the guarantee was 'on demand'. That decision is under appeal. The final date for concluding written submissions in the appeal is 20 July 2011.

[6] There are no liquid assets in the Norwegian liquidation[5] and the Company is plainly insolvent.

[7] The opposition to NTM's application in this jurisdiction was originally based, at least in part, upon an allegation that the Company had a cross claim falling within the principle in **Re Bayoil**[6], but it soon became apparent that there was no evidence that any such cross claim, if seriously arguable, would overtop NTM's claim in the sum of US$30.4m and the point was (rightly) abandoned at the last hearing, on 27 June 2011. I need therefore say no more about that.

[8] The remaining ground of opposition is that the debt is disputed. It seemed to me at the outset that the Company was in some difficulty in adopting this line, since NTM appears to have met the relevant requirements set out in **Sparkasse Bregenz Bank AG v Associated Capital Corporation ECCA**[7]. It has sued the debtor in the courts of the appropriate jurisdiction and in a contested application has obtained a judgment that the Company is indebted to it in a liquidated amount. But the Company insists that the debt remains disputed.

[9] The evidence shows that the debt is not disputed *by the Company* in any proceedings in Norway (or anywhere else). Liability is, as I have said, disputed by the seven co-guarantors in the City Court. Mr Hare and Mr Nader, who have appeared for the Company and Brutel, rely on the challenge made by the co-guarantors as evidence that the debt is disputed. They have invited Mr Brandi to cause the Company to be joined to the City Court proceedings, offering him an indemnity if he will do so, but he has declined.

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[5] there are some claims against one of its directors
[6] [1999] 1 WLR 147
[7] BVIHAP 2002/0010

[10] Mr Willins, for NTM, says that the Company is estopped by the decision of the Probate Court from contending in this jurisdiction that it is not presently indebted to NTM in the sum claimed. It is common ground that the Company is estopped from denying that it is in bankrupt administration in Norway, but Mr Hare and Mr Nader contend that the Company is not estopped from disputing that the guarantee is an on demand guarantee giving rise to an immediate liability to pay without set off or counterclaim, because, they submit, that question was merely an issue in the proceedings before the Probate Court and the decision of the Probate Court on that issue was not final and conclusive.

[11] It is common ground that a foreign judgment in proceedings between the identical parties will create an issue estoppel binding between them in proceedings here, provided that the foreign judgment is (1) of a court of competent jurisdiction; (2) final and conclusive; and (3) on the merits. I do not think there can be any dispute that the Probate Court was a Court of competent jurisdiction; nor do I consider that there can be any dispute that it decision was 'on the merits' in the sense explained by Lord Brandon in **The Sennar**[8].

[12] The real question is whether the judgment is final and conclusive. Simply because another court (or, for that matter, the same judge of the same court) may decide an identical issue between different parties in a different manner does not, in my judgment, mean that a judgment is not final and conclusive as between the original parties. The City Court proceedings are therefore irrelevant for present purposes. Of course, a decision in that Court in favour of the other seven guarantors on the 'on-demand' point would be inconsistent with the decision of the Probate Court, but, because it would be between different parties, it would be irrelevant to the question what, if any, issue estoppels bind the Company as a result of the decision of the Probate Court.

[13] However, the evidence also shows that under section 114 of the Norwegian Bankruptcy Act ('section 114') a company in bankrupt administration or a member of the creditors committee or

[8] [1985] 1 WLR 490 at 499E-H

any creditor whose claim has been admitted in its insolvency may challenge a creditor's claim[9] in the bankruptcy. Section 114 is in the following terms:

> 'If the executive trustee [liquidator] recommends that a claim not be approved as reported, or if the debtor, a member of the creditor's committee or a creditor that have had his reported claim approved objects to the report, the executive trustee shall invite the reporting creditor to explain the report by a stipulated date.
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> If the reporting creditor fails to explain the report within the stipulated date, or if the recommendation that the reported claim is approved – or the objection to the report is upheld, the trustee shall report this to the Bankruptcy Court. The Bankruptcy Court shall invite the reporting creditor to commence court proceedings within three weeks and inform the reporting creditor that the recommendation or objections will be used as a basis for testing the reported claim if proceedings are not commenced within the stipulated dated.
>
> Only the reporting creditor and the party having raised objections to the reported claim are considered to be parties to the proceedings as mentioned in Section 114, subparagraph 2. If the Bankruptcy Court rules in favor of the objecting party without the objecting party being rewarded litigation costs, the Court may decide that the party shall have compensation from the estate, either fully or partly, limited to the benefit received by the estate.'

[14] The fact that the Company or another creditor might challenge a claim made in the bankrupt administration of the Company does not mean that the Probate Court's judgment was not final and conclusive for the purposes of Rule 41 in Dicey, Morris & Collins[10] ('Rule 41'). It is not suggested by either side that the Probate Court has the power to review the decision it made on 30 June 2010. Section 114 of the Bankruptcy Act does not make the decision of the Probate Court in any way provisional. It introduces into the Norwegian bankruptcy scheme a mechanism of insolvency law familiar from many jurisdictions whereby the company itself or other persons interested in the distribution of the estate may challenge the claims made by creditors *in the estate*. It is true that this might permit an application by the Company in the present case to challenge a claim/proof of debt put in by NTM. It would obviously be highly improbable that the Probate Court, dealing with such a challenge, would go behind its decision of 30 August 2010, but even if it did it would not be

[9] i.e. proof of debt
[10] 14th Ed at page 616ff

reviewing or setting aside the judgment upon which it wound the Company up. It would be deciding, as between NTM and all those interested in the distribution of the estate (not merely as between NTM and the Company), whether NTM should be allowed to share in the assets and, if so, for how much. The original judgment would remain unaffected. The only way in which it could be got rid of would be through a successful appeal of the order of 30 August 2010. In fact, time for appealing has now expired, but even if it had not, the judgment would still be treated, for issue estoppel purposes, as final and conclusive.[11] If a judgment capable of being appealed is treated as final and conclusive for the purposes of the issue estoppel rule, the mere fact that a Court administering claims in bankruptcy might at some time in the future adjust the rights of the petitioning creditor upon a challenge being made within the liquidation cannot render the judgment upon which it succeeded provisional, or any other than final and conclusive as between the parties to that decision.

[15] The position is quite different from that in **Nouvion v Freeman**[12], where the foreign court had given what was effectively a provisional judgment. There was nothing provisional about the decision of the Probate Court in the present case. In my judgment it is final and conclusive for the purposes of Rule 41.

[16] If, therefore, it is necessary for NTM to show that the Company is estopped by the decision of the Probate Court, in my judgment it succeeds in doing so. For both the foregoing reasons, therefore, I shall appoint Liquidators over the Respondent.

**Commercial Court Judge**
11 July 2011

[11] **The Sennar** (supra) at 494B
[12] (1899) 15 AC 1